United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2437

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

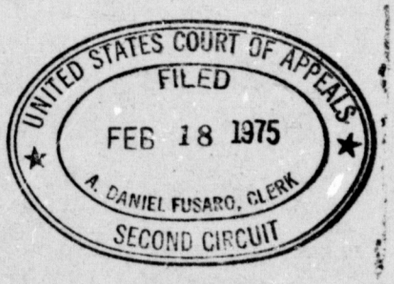
UNITED STATES OF AMERICA, APPELLEE

vs.

RAYMOND JOHNSON, APPELLANT

On Appeal from United States District Court
for the District of Vermont

REPLY BRIEF FOR THE APPELLANT



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REPLY BRIEF FOR APPELLANT

SUPPLEMENTAL FACTUAL STATEMENT

The purpose for which Johnson made the trip on December 26, 1973, from his home in Milford, Connecticut, to Loewe's home in Walpole, New Hampshire, was to take a present to Loewe's parents, which Johnson did usually every year. (Tr.312).

REBUTTAL ARGUMENT

A. Sufficiency of evidence

The Government's attempt to characterize evidence of Johnson's guilt as "overwhelming" is not borne out by analysis. A critical examination of the evidence noted by the trial court as synopsized by the Government boils down as follows:

1. Johnson and Loewe had been friends for several years, and had visited each other's homes from time to time.

2. Johnson had pleaded guilty to a misdemeanor offense in New Jersey, after spending 5 to 7 days in jail, in order to attain his release. (Such testimony bore only on the question of credibility of the witness.)

3. Johnson knew Loewe was on probation in New Hampshire in connection with other than drug charges.

4. While Loewe had made several trips to Montreal to get drugs, Johnson was unaware of them.

5. Contrary to the trial court's opinion and the Government's recitation in its brief, Johnson did not deny taking a trip to Montreal earlier in December, although, testifying in June, he believed the trip to have occurred in November and stated that it could have been taken in December. (Tr.353,411)

6. Johnson travelled to Loewe's home on December 26 to bring a Christmas gift to Loewe's parents, accompanied Loewe on the spur of the moment to Montreal, slept soundly at a motel (having been up since early morning and having travelled approximately 300 miles that day) so as not to be aware of Loewe's early morning sojourn, and then went on to Montreal with Loewe the next day.

7. Contrary to the trial court's opinion and the Government's recitation in its brief, Johnson was not described as "highly nervous and upset" at the initial Customs primary inspection; rather, Inspector Hamilton stated that Johnson "seemed nervous and ill at ease." (Govt.App., p.2 Tr.26)

8. Johnson and Loewe were seated together after the drugs were found, during which time they could have communicated.

9. Johnson then told a Customs agent false statements - later admitted by him to be false and made because of panic - about his association with Loewe and also, upon arrest, said he had never been to Canada.

While it is true that isolation of facts to demonstrate lack of probity of guilt is not the sole measure of evidence, the cumulation of facts here still fails to meet the central point made in Johnson's brief. That point is that no evidence connects Johnson to the illegal drugs or their acquistion. And the conclusion of the trial court - which may or may not have been that of the jury - that Johnson's credibility was substantially destroyed, does not require, nor permit, the inference that Johnson must have known of the presence of the drugs in the car. Nowhere did the trial court state

or opine that Johnson's testimony was inherently incredible, as the Government would have this Court do.

The Government's reliance on an argument based on supposed inherently incredible evidence is misplaced. The Government says that Johnson must have known that Loewe was involved with drugs because of their association. But there is evidence only that Johnson made one other trip to Canada with Loewe, on which occasion a detailed search of Loewe's car was made and revealed nothing. There is no evidence that Johnson knew of Loewe's other trips or of his drug involvement. The fact that Johnson had seen Loewe maybe a "couple of times" in the fall of 1973 (Tr.347) certainly doesn't mean that he knew of Loewe's drug use or dealings, for it is a human truth that one doesn't tell even one's close friends all his innermost secrets - particularly those involving criminal activity. And where one sees such a friend infrequently - no more than once or twice a month on the average - it is not inherently incredible to

suppose that the friend has not learned of the criminal drug activity.

The Government goes on to say that it is incredible for Loewe to have left Johnson sleeping at a motel in the middle of the night and to have returned later without Johnson's knowing it. Such a conclusion is purely speculative; indeed, it is entirely possible for Johnson to have slept very soundly after a 300 plus mile trip over icy and wet roads so as not to have heard the departure and return of Loewe. Clearly, such testimony is not "inherently incredible."

Hence, the Government's reliance on United States v. Castro, 476 F.2d 750, 753 (9th Cir. 1973) and United States v. Cisneros, 448 F.2d 298, 305-06 (9th Cir. 1971) is misplaced. The Ninth Circuit rule, permitting a jury to infer criminal knowledge and intent if it disbelieves a defendant's denial of guilt, has not been adopted by this Court. In

Cisneros, a case involving the sale of heroin, the defendant's denial was made in the face of evidence of fluorescent powder on his hands from handling the marked money and of evidence that defendant was a heroin addict. Such evidence clearly connected Cisneros to the corpus delicti of the crime. In this case, no such connection of Johnson to the illegal drugs exists. The Castro case does not include a sufficient factual statement to permit proper analysis of it.

Likewise, the Government's citation of United States v. Arcuri, 405 F.2d 691 (2d Cir. 1968), is not apposite to this case. In Arcuri, a case involving the possession and concealment of counterfeit money and conspiracy to sell the same, the defendant denied ever handling counterfeit money or knowing one who had. In the face of this testimony, Arcuri's fingerprint was found on one of the envelopes containing some of the counterfeit money, and there was testimony that Arcuri had discussed the sale of counterfeit money shortly before the events in question.

Finally, in his presence, Arcuri's codefendant had delivered the counterfeit money to a person who had contacted Arcuri. Thus, the denial by Arcuri was in fact able to have been found properly to have been false exculpatory statements, which in turn can be evidence probative of guilt.

The case of Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952), cited in Arcuri and by the Government, is not a criminal case but rather concerned a question of summary judgment in a civil suit for libel and slander. It does not support the proposition that a jury in a criminal case may infer the affirmative of a question solely on the basis of its disbelief of the negative assertion by a defendant.

Nor does United States v. Tramunti, 500 F.2d 1334, 1338 (2d Cir. 1974) help the Government's argument to this effect. The evidence in Tramunti, was concerned with a denial by Tramunti of knowing a person with whom he had been photographed leaving a large wedding reception. This Court observed that the jury was permitted to conclude that Tramunti's statement

was a fabrication, as a jury may do with the testimony of any witness.

The last case cited by the Government, United States v. Pui Kan Lam, 483 F2d 1202, 1208 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974), is factually distinguishable from this case and was discussed in Appellant's Brief at pages 17-19.

Thus, the issue boils down to the question of whether the evidence detailed earlier in this Reply Brief is sufficient - individually or cumulatively - to support the verdicts of guilt. The nine points listed above demonstrate that Johnson and Loewe had been friends - at times, close friends - for many years, that Johnson knew Loewe had been involved in criminal activity other than drugs, that Johnson's credibility might have been impaired because of his New Jersey conviction of the misdemeanor charge of entering that state for an illegal purpose, that Johnson had taken one other trip to Montreal with Loewe, that Johnson was a passenger in Loewe's car when the drugs were found, and that Johnson made false statements - later admitted to be false and not denied as having been made - to attempt to

extricate himself from suspicious circumstances.

Nowhere is there any evidence connecting Johnson to the illegal drugs or their acquisition. There was no fluorescent powder on Johnson, as there was in Cisneros, supra. There was no fingerprint of Johnson on the bags containing the drugs, as there was in Arcuri, supra. There was no handling of money by Johnson, nor evidence of drug use by Johnson, as there was in Cisneros. There was no activity as a lookout or as a "manipulative leader" and "provider and proposer" by Johnson, as there was in Pui Kan Lam, supra.

The Government also cites United States v. Lacey, 459 F.2d 86, 90 (2d Cir. 1972) in an effort to distinguish United States v. McConney, 329 F.2d 467 (2d Cir.1964). In Lacey, a charge of knowingly possessing counterfeit money, the defendant gave two inconsistent statements concerning his manner of possessing the counterfeit bills and then denied making the first statement. This Court upheld Lacey's conviction, allowing the inference of guilty knowledge to be made in light of that evidence. The Court went on to note that, had Lacey been proved only to have

told a false statement initially, a more reasonable inference of panic - inducing the false statement - could have been made. However, the added ingredient of Lacey's denial of that statement tipped the scales against him and distinguished McConney. This key point was omitted from the Government's discussion at page 24 of its Brief. See 459 F.2d at 90.

The situation here is not like Lacey, since Johnson does not deny making the false exculpatory statement. Rather, it is more like United States v. McConney, supra, and United States v. Kearse, 444 F.2d 62 (2d Cir. 1971), discussed in Appellant's Brief at pages 19-21.

Finally, on the question of sufficiency of the evidence, there must be evidence that Johnson aided and abetted Loewe by somehow participating and acting to bring about the success of the criminal plan. As pointed out in legions of cases, "mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring

that the defendant knew about the enterprise and intended to participate in it or to make it succeed. United States v. Cirrillo, 499 F.2d 872, 883 (2d Cir. 1974), cert. denied, 43 U.S.L. Week 3331 (U.S. Dec. 9, 1974) (No.73-1832). Two of the eight defendants' convictions were reversed because of the lack of such evidence. There was no evidence that the two (Gutierrez and Gaber) participated in any narcotics sale or purchase or that they possessed narcotics. There was evidence only of visits on two occasions between Gutierrez and one of the other defendnats, at which times any number of lawful conversations or transactions could have occurred. The Court ruled that the Government has failed "to adduce any non-hearsay [or hearsay] evidence that Gutierrez was aware of the narcotics transaction, . . . it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt." 499 F.2d at 886. Accord, United States v. Burrell, 496 F.2d 609 (3d Cir. 1974).

The same situation exists in Johnson's case. The fact that he gave a false exculpatory statement is not of sufficient weight to infer awareness, since it occurred after the drugs were seized, at which time Johnson knew that something was terribly wrong and was therefore terrified. The false statements by Johnson are equally predicable on panic and a desire to extricate himself from suspicions circumstances. Ergo, they should not bear on the issue of Johnson's awareness of the presence of the drugs in Loewe's car. To do so would, in the words of United States v. McConney, 329 F.2d 467, 470 (2d Cir. 1964), "place too much weight on defendant's extra-judicial exculpatory statement." As in McConney, the statements shown to be false did not bear on the corpus delicti of the crime. See ibid.

B. Inconsistency of Verdicts

The Government's brief incorrectly stated the issue involved in Count III at page 26 of its brief. The question was not whether Johnson intended to aid and abet Loewe in distributing the drugs. The

question was whether Johnson intended to aid and abet Loewe's possession of the drugs, that possession being with intent to distribute the drugs. The charge of the district court clearly states the issue. (Appendix to Appellant's Brief, page 36)

As such, Loewe having admitted his possession with intent to distribute, the question was solely one of Johnson's aiding and abetting Loewe. That question is identical for Counts II and III of the indictment. Manifestly, the jury was confused; its acquittal on Count III required acquittal on Count II.

CONCLUSION

The conviction of Raymond Johnson on Counts I and II should be reversed. Alternatively, a new trial should be ordered on both Counts.

Respectfully submitted,

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February 13, 1975

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Raymond Johnson, Appellant	:	

Certificate of Service

I do hereby certify that on the 14th day of February, 1975, I made service of the Reply Brief upon the United States of America, appellee, by mailing two copies of the same to George W. F. Cook, United States Attorney for the District of Vermont, P.O. Box 10, Rutland, Vermont 05701.

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